IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

WP(C).No. 3442 of 2004(I)
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AGAINST THE ORDER IN EP.94/2001 IN
OS.117/1999 of MUNSIFF COURT,MUVATTUPUZHA
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PETITIONER:
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MYSORE FERTILIZERS COMPANY INDUSTRIES
LIMITED, MADRAS, REP. BY ITS REGIONAL MANAGER,
S.S.RAMAKRISHNAN, AGED 69 YEARS,
H.NO.27/697, PALLIPRAM VILLAGE, PALAKKAD.

BY ADV. SRI.T.KURIAKOSE PETER
SRI.ABRAHAM P.GEORGE

RESPONDENTS:
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T.M.ALIYAR, THOTTATHIKUDIYIL HOUSE,
RANDAR KARA, MUVATTUPUZHA.

BY ADV. SRI.C.A.MAJEED

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/09/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 3442 OF 2004

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF THE EXEUCTION PETITION FILED BY THE PETITIONER.

EXT.P2 : TRUE COPY OF THE OBJECTION FILED BY THE JUDGMENT DEBTOR DT.3.12.01.

EXT.P3 : TRUE COPY OF THE BALANCE STATEMENT DT.02.01.01 FILED BY THE JUDGMENT DEBTOR.

EXT.P4 : TRUE COPY OF THE AFFIDAVIT FILED BY THE DECREE HOLDER.

EXT.P5 : TRUE COPY OF THE ORDER DT.18.01.02 PASSED BY THE LEARNED MUNSIFF IN EP NO. 94/01.

EXT.P6 : TRUE COPY OF THE ORDER DATED 26.7.02 IN CRP NO.762/02 PASSED BY THIS HON'BLE COURT.

EXT.P7 : TRUE COPY OF THE ORDER PASSED BY THE MUNSIFF'S COURT IN EP NO.94 OF 2001 DATED 16.12.03.

/TRUE COPY/

PA TO JUDGE.

**PIUS C. KURIAKOSE, J.**

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W.P.(C) No. 3442 OF 2004

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Dated this the 20th day of September, 2007

**JUDGMENT**

The decree holder challenges Ext.P7 order under which the execution court has declined its prayer for issuing warrant for arrest and detention of the respondent in execution of the money decree.

2. Heard Sri.Kuriakose Peter, counsel for the petitioner and Sri.C.A.Majeed, counsel for the respondent. Inviting my attention to Ext.P2 objections filed by the respondent to the execution petition containing a prayer for arrest and detention on the ground that the respondent is not paying the debt in spite of sufficient means, learned counsel submitted that there was no contention raised by the respondent that he was not having means sufficient to pay the decree debt. The only contention was that a sum of Rs.62,500/- was paid by means of DD No.155387 and credit should be given to the proceeds of that DD. My attention was drawn by the learned counsel also to the earlier order of the execution court, Ext.P5, where by after noticing that the contention was only that the balance payable is Rs.35,206/- after adjusting the amounts allegedly paid by means of DD, the learned Munsiff relied on an affidavit submitted on behalf of the petitioner (to which no counter affidavit had been filed) and found that the plea of

discharge was not substantiated and accordingly ordered warrant for his arrest. Learned counsel also drew my attention to Ext.P6 order of this Court disposing of a CRP filed by the respondent against Ext.P5. Under Ext.P6, counsel pointed out that, the petitioner was directed to pay the admitted amount of Rs.35,300/- and given an opportunity to substantiate his objections. Counsel submitted that under the impugned order which was passed after the enquiry pursuant to Ext.P6 was complied. The only contention raised by the respondent was repelled by the learned Munsiff. But, the learned Munsiff has proceeded to find that the evidence in the case is not sufficient to hold that the respondent has been willfully negligent in the matter of paying the debt. Such a finding is not founded on Ext.P2 objections and the same is beyond the scope of the order of remand, Ext.P6. The finding that the respondent is having sufficient means and is willfully negligent to pay the decree debt recorded in Ext.P5 has attained finality.

3. The learned counsel for the respondent would submit that the point of time with reference to which the liability of a judgment debtor to be arrested and detained in civil prison is, the point of time when the court is considering the prayer for arrest. At the time of enquiry which is held pursuant to Ext.P6 order of this Court, no evidence had been adduced by the petitioner to show that the respondent has been willfully

negligent in the matter of paying the decree debt or that he is in possession of sufficient means.

Going by Clause B under the proviso to Section 51 of CPC, any judgment debtor who has had sufficient means to pay the decree debt or a substantial portion there of and refuses or neglects or has refused or neglected to pay the same in spite of means will be liable to be arrested and detained. Thus, the relevant time is any point of time subsequent to the passage of the decree. By not-traversing the applications in the execution petition and the affidavit on the basis of which Ext.P5 was issued, the respondent has admitted his financial ability to pay the decree debt. There is merit in the submission of Mr.Kuriakose that Ext.P5 to the extent it holds that the respondent has final ability has attained finality. It is also noticed that, without much difficulty, the respondent could comply with the condition imposed by this Court under Ext.P6 that, Rs.35,000/- the admitted amount should be paid. What was paid by the respondent pursuant to Ext.P6 being 1/3$^{rd}$ of the total debt, in my opinion, a substantial portion of the entire debt. The finding seen entered by the learned Munsiff under Ext.P7 that the respondent is not liable to be arrested and detained is in fact barred by principles of res judicata. For these reasons, Ext.P7 is liable to be set aside and setting aside Ext.P7, I direct the execution court to pass order of arrest against

the respondent. However, considering the submissions of Mr.Majeed, I permit the respondent to pay off the balance decree debt which inclusive of interest should be around Rs.65,000/-, in equal monthly instalments of Rs.3,000/- commencing from the 15th of October 2007. If any three defaults are made(need not be consecutive), he will forfeit the above benefit. It is open to the petitioner to file an EA seeking immediate arrest, if the respondent makes defaults in which case the EA will be allowed without notice to the respondent and appropriate orders will be passed in the light of the findings entered herein.

**PIUS C. KURIAKOSE, JUDGE**

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